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The Law, Technology & The Arts Symposium: Copyright in the Digital Age: Reflections on *Tasini* and Beyond - Introduction

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THE LAW, TECHNOLOGY & THE ARTS SYMPOSIUM:

COPYRIGHT IN THE DIGITAL AGE:

REFLECTIONS ON *TASINI* AND BEYOND

INTRODUCTION

Compared to the nineteenth century, the Supreme Court of today hears a relatively small percentage of intellectual property cases. It is a noteworthy event, therefore, when the Court decides to take on a case related to patent, copyright, or trademark law. The case of *New York Times Co. v. Tasini*[1] was no exception.

The issue presented in *Tasini* was parochial by some accounts, but the implications of the decision were potentially significant. The case was brought by the National Writers Union against The *New York Times* and other major media players such as Newsday, Inc. and Time, Inc. and Lexis/Nexis. Jonathan Tasini and several other freelance writers accused the publishers of copyright infringement for the electronic use of their freelance work. Freelance writers frequently sell their work to, for instance, a newspaper, which allows the newspaper to publish the work in print. The newspaper and other publishers thought that they could also republish the work in electronic format without the permission of the author. The freelancers disagreed, and so did the Supreme Court.

The Court held that the author, not the publisher, owns the copyright in the electronic reproduction of the print version.[2] This holding was a major victory for freelance creators, but the larger implications of the *Tasini* decision for freelancers and publishers remained unanswered. The implications of *Tasini* were at the heart of the inaugural symposium of the Center for Law, Technology & the Arts: *Copyright in the Digital Age*: *Reflections on* Tasini *and Beyond*. Two prominent keynote speakers, Professors

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[1] 533 U.S. 483 (2001).
[2] *Id.*

Maureen O'Rourke and Lydia Loren, and several distinguished commentators provided insightful comments and analysis on this issue.

Professor Maureen O'Rourke of Boston University School of Law informs us that many commentators view *Tasini* "as primarily a moral rather than economic victory for most freelancers."[3] This is because long before *Tasini* was decided by the Supreme Court, major publishers used their bargaining power to require freelancers, without additional compensation, to contractually sign over both print and electronic rights through "all-rights agreements." Professor O'Rourke details some of the strategies being pursued by freelancers to counter the heft of the publishers' bargaining power, from collective bargaining to lobbying for statutory changes to the copyright law. In the end, Professor O'Rourke encourages freelancers to "develop creative ways to use technology"[4] to enhance their bargaining power and for freelancers to "educate themselves about their rights."[5]

Professor Loren focused her thoughts on the implications of *Tasini* for the music industry, warning us that the "music industry is in crisis."[6] The crisis is a result of not only digital technology, but the "layering of copyright ownership interests and the complexity of copyright law."[7] For Professor Loren, representative of this "layering" effect, which leads to high transaction costs, is copyright law's emphasis on the author, as highlighted by the *Tasini* decision. The primacy of the author has relegated the public interest to secondary status. Professor Loren, recognizing the delicate incentive dynamic of copyright law, calls for a re-evaluation of how copyright law balances the interests between the author and the public.[8] Professor Loren's primary goal is to reduce transaction costs and allow for incentivized creation of music and its efficient delivery. To this end, she makes several recommendations, including the creation of an independent right in derivative works as a means of reducing transaction costs; the repeal of the compulsory mechanical license for musical works; the creation of a copyright in sound recordings equal to that presently enjoyed by copyright owners in musical works; and a unified copyright as opposed

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[3] Maureen A. O'Rourke, *Bargaining in the Shadow of Copyright Law after* Tasini, 53 CASE W. RES. L. REV. 605, 606 (2003).

[4] *Id.* at 607.

[5] *Id.*

[6] Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, 53 CASE W. RES. L. REV. 673 (2003).

[7] *Id.* at 675.

[8] *Id.*

to the various individual and divisible rights set forth in section 106 of the copyright code.[9]

It was a pleasure to host this symposium under the auspices of the Center for Law, Technology & the Arts. I hope you enjoy, as I have, reading the following articles and comments.

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[9] *Id.* at 718.

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